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8 Group, LLC, Pixar, and Disney Enterprises, Inc.

9  
10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 OAKLAND DIVISION

13 Deborah J. Thomas,

14 Plaintiff,

15 vs.

16 The Walt Disney Company, Walt Disney  
Studios, Disney Press, Pixar Animation  
17 Studios, Walt Disney Feature Animation, Walt  
Disney Pictures, Disney Enterprises, Inc., and  
18 DOES 1 through 100, Inclusive,

19 Defendants.

CASE NO. 4:07-cv-4392

**RESPONSE TO PLAINTIFF'S  
OBJECTIONS TO REQUEST FOR  
JUDICIAL NOTICE IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT**

20  
21  
22 Plaintiff's objections to Defendants' Request for Judicial Notice in Support of Defendants'  
23 Motion to Dismiss Plaintiff's First Amended Complaint are without merit. Each of the facts set  
24 forth in Defendants' Request are generally known or "capable of accurate and ready determination  
25 by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. As a  
26 general matter, Plaintiff's objections should be disregarded because she misunderstands the facts  
27 of which Defendants ask the Court to take judicial notice. Plaintiff repeatedly objects to the Court  
28 taking judicial notice of the contents of articles and press releases attached to the Roberts

1 Declaration. But, Defendants simply request that the Court take judicial notice of the publicity  
 2 surrounding “Finding Nemo,” as evidenced by the articles and press releases attached to the  
 3 Roberts Declaration. Each of Plaintiff’s objections is addressed below:

4 1. Defendants ask that the Court take judicial notice that “Finding Nemo” and its  
 5 general plot, story line and characters, was publicized before its May 30, 2003 general release, as  
 6 reported in Exhibits A-I of the Roberts Declaration. Plaintiff objects, claiming that this is not a  
 7 fact, but an opinion subject to reasonable dispute. The Court, however, may take judicial notice of  
 8 adjudicative facts such as those appearing in newspapers. *Crowder v. Kitagawa*, 81 F.3d 1480,  
 9 1491 n.10 (9th Cir. 1996) (courts may take judicial notice of adjudicative facts appearing in  
 10 newspapers); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995) (taking judicial  
 11 notice of existence of corporate layoffs based upon newspaper articles); *Gomez-Vigil v. INS*, 990  
 12 F.2d 1111, 1115 (9th Cir. 1993) (“I will take judicial notice of the existence of accounts in leading  
 13 newspapers stating that former Sandinistas control the Nicaraguan army and police forces”);  
 14 *Cochran v. NYP Holdings, Inc.*, 58 F.Supp.2d 1113, 1123 (C.D. Cal. 1998) (taking judicial notice  
 15 of “overwhelming deluge of publicity attendant to” the O.J. Simpson trial). Plaintiff does not and  
 16 cannot explain why these cases do not apply to the articles attached as Exhibits A-I to the Roberts  
 17 Declaration.

18 Plaintiff further asserts that these exhibits do not publicize “Finding Nemo’s” general plot,  
 19 story line, and characters. This is false. Exhibit D, a March 6, 2003 *USA Today* article, states:  
 20 “[d]ue in theaters May 30, Nemo features the voices of Albert Brooks and Ellen DeGeneres in the  
 21 story of a widower clown fish who tries to find his only son after the small fry is abducted by an  
 22 Australian dentist for his aquarium.” Exhibit H, a May 25, 2003 *Los Angeles Times* article,  
 23 explains that “Finding Nemo” is the story of the plucky orange-and-white-striped clownfish,  
 24 kidnapped from his home in the Great Barrier Reef. Exhibit I, a May 26, 2003 *Time Magazine*  
 25 article, describes:

26 Long before Nemo comes along, Marlin is a fussy little anxiety machine. When he  
 27 learns he’s to be a father -- of 400 baby clown fish -- he fidgets: ‘What if they don’t  
 28 like me?’ But he’s right to be concerned for his brood in the fish-eat-fish world of  
 Australia’s Great Barrier Reef. A shark devours Marlin’s wife and 399 of her eggs.  
 That leaves little Nemo (Alexander Gould) -- the one survivor, handicapped with

1 an underdeveloped fin -- and Marlin, burdened with an overdeveloped sense of  
 2 dread. When Nemo is old enough for fish school, Dad's pessimism is again  
 3 validated: the lad defiantly swims into open water, where he is scooped up by an  
 4 angler -- a dentist, with an aquarium in his office and a nasty, piscicidal little niece  
 5 he can't wait to give this cute clown fish to. Marlin, who must now conquer his  
 6 own fear of the great wet world, that 'swirling vortex of terror,' has a companion in  
 7 his search: Dory (Ellen DeGeneres), a blue tang with a sunny disposition and a  
 short-term memory problem. In their hunt for Nemo, they are aided and threatened  
 by all manner of sea creatures: a menacing anglerfish, some not entirely  
 trustworthy members of Sharks Anonymous, a school of shocking jellyfish and a  
 family of surfer-due sea turtles. In captivity, Nemo finds his own friends: Peach,  
 the starfish (Allison Janney), and the tank commander Gill (Willem Dafoe), a tough  
 who mutters, 'Fish ain't meant to be in a box.'

8 Exhibit J, a January 7, 2003 press release, comments:

9 *Finding Nemo* follows the comedic and eventful journeys of two fish - Marlin and  
 10 his son Nemo - who became separated in the Great Barrier Reef when Nemo is  
 11 unexpectedly taken far from home and thrown into a fish tank in a dentist's office  
 12 overlooking Sydney harbor. Buoyed by the companionship of a friendly-but-  
 forgetful fish named Dory, the overly cautious father embarks on a dangerous trek  
 and finds himself the unlikely hero of an epic journey to rescue his son - who  
 hatches a few daring plans of his own to return safely home.

13 Exhibit L also provides a description of the plot line and characters in the film. This Court may  
 14 therefore take judicial notice that "Finding Nemo's" plot, story line and characters were publicized  
 15 before its theatrical release, as evidenced by Exhibits A-I.

16 2. Defendants ask the Court to take judicial notice that "Finding Nemo" was  
 17 advertised in trailers preceding other movies and in television commercials in advance of its  
 18 general release on May 30, 2003, as is generally done for major motion pictures. Plaintiff claims  
 19 that this is subject to dispute, not generally known, and not capable of accurate determination by  
 20 resort to sources whose accuracy cannot be questioned. However, it is generally known that  
 21 trailers for major motion pictures permeate television and movie theaters before their theatrical  
 22 release. This is especially true for motion pictures from major entertainment companies like  
 23 Disney. Indeed, one can already view trailers for Disney and Pixar's next film about a robot's  
 24 adventures traveling across the universe, "Wall· E," which will not be released until Summer  
 25 2008. (See <http://www.slashfilm.com/2007/10/01/new-wall-e-movie-trailer/>.) Based upon this  
 26 generally known practice, the Court may take judicial notice that "Finding Nemo" trailers were  
 27 shown before its theatrical release. Fed. R. Evid. 201.

3. Defendants ask the Court to take judicial notice of the fact that before “Finding Nemo” was generally released, it was publicized that Defendants would develop video games based on the film, as reported in Exhibits J and K to the Roberts Declaration. Plaintiff objects claiming that this is not generally known and not capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. The Court, however, may take judicial notice of the existence and contents of websites. *See Lund v. Luprino*, 2007 WL 1775474, \*1 n.3 (E.D. Cal. 2007) (“[T]he court will grant judicial notice of the two documents on the state Emergency Services’ website”); *Caldwell v. Caldwell*, 420 F. Supp. 2d 1102, 1105 n.3 (N.D. Cal. 2006) (granting request to take judicial notice of two sets of web pages); *Pollstar v. Gigmania*, 170 F.Supp.2d 974, 978 n.2 (E.D. Cal. 2000) (“[T]he Court may take judicial notice of the printout of the web site for the limited purpose of evaluating the online license agreement.”); *Hendrickson v. eBay, Inc.*, 165 F.Supp.2d 1082, 1084 n.2 (C.D. Cal. 2001) (“To the extent some of the descriptions about eBay’s website are not in the record, the Court takes judicial notice of [www.eBay.com](http://www.eBay.com) and the information contained therein....”); *Cairns v. Franklin Mint Co.*, 107 F.Supp.2d 1212, 1216 (C.D. Cal. 2000) (taking judicial notice of Andy Warhol’s Internet site even though it was not submitted by any party). Plaintiff does not and cannot explain why these cases do not apply to the press releases attached as Exhibits J and K to the Roberts Declaration.

Plaintiff also asserts that Exhibits J and K do not establish that the general public was aware of these press releases. But, Defendants are not asking the Court to take judicial notice that the general public was aware of the press releases. Rather, the Court should take judicial notice of the fact that Defendants, through these press releases, publicized that they would develop video games based on “Finding Nemo.”

4. Defendants ask the Court to take judicial notice of the fact that before the May 30, 2003 release of the film “Finding Nemo,” Defendants publicized that they planned an extensive marketing campaign in connection with the film, as reported in Exhibit K to the Roberts Declaration. Plaintiff objects, again claiming that this is not a generally known fact and is not capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. As explained above, Plaintiff does not and cannot dispute that the Court may take

1 judicial notice of the contents of a website. *See Lund*, 2007 WL 1775474 at \*1 n.3; *Caldwell*, 420  
2 F.Supp.2d at 1105 n.3; *Pollstar*, 170 F.Supp.2d at 978 n.2; *Hendrickson*, 165 F.Supp.2d at 1084  
3 n.2 ; *Cairns*, 107 F.Supp.2d at 1216. Further, Plaintiff's contention that Exhibit K fails to  
4 establish that Defendants engaged in an extensive marketing campaign is irrelevant. Defendants  
5 merely ask the Court to take judicial notice that Defendants *publicized* their intent to engage in an  
6 extensive marketing campaign. Such publication is evidenced by Exhibit K.

7         5. Defendants ask the Court to take judicial notice of the fact that "Finding Nemo"  
8 was released on DVD on November 4, 2003, as reported in Exhibits M and N to the Roberts  
9 Declaration. Plaintiff objects, saying that the articles mention that the film was released on DVD  
10 and VHS, but do not state the release date. The release date, however, is capable of accurate  
11 determination by resort to the articles attached to the Roberts Declaration. As explained in  
12 paragraph 21 of the Roberts Declaration, Exhibit M is dated November 7, 2003 and announces  
13 that "Finding Nemo" was released on DVD the previous Tuesday. November 7, 2003 fell on a  
14 Friday, so the previous Tuesday was November 4, 2003. Exhibit N is dated November 18, 2003  
15 and announces that "Finding Nemo" was the biggest selling DVD in just two weeks. Exactly two  
16 weeks before November 18 (14 days) was November 4, 2003. Finally, also attached to the  
17 Roberts Declaration is Exhibit R, which is dated November 5, 2003 and announces that "Finding  
18 Nemo" sold 8 million units in its first day. One day before November 5 was November 4, 2003.  
19 Based upon the dates of the various articles attached to the Roberts Declaration and the articles'  
20 description of the DVD release date, the Court can calculate and take judicial notice that the DVD  
21 release date was November 4, 2003.

22         6. Defendants ask the Court to take judicial notice of the fact that the success of the  
23 release of "Finding Nemo" on DVD was publicized in November 2003, as reported in Exhibits M-  
24 S to the Roberts Declaration. Plaintiff objects, saying this is subject to dispute, not generally  
25 known, and not capable of accurate determination by resort to sources whose accuracy cannot  
26 reasonably be questioned. As explained above, the Court may take judicial notice of adjudicative  
27 facts appearing in newspapers. *Crowder*, 81 F.3d at 1491; *Ritter*, 58 F.3d at 458; *Gomez-Vigil*,  
28 990 F.2d at 1115; *Cochran*, 58 F.Supp.2d at 1123. Plaintiff further argues that Exhibits M-S do

1 not establish that the general public knew anything of the success of the “Finding Nemo” DVD  
2 release. Once again, Plaintiff misconstrues Defendants’ request. Defendants ask that the Court  
3 take judicial notice that the success of the “Finding Nemo” DVD release was publicized, as  
4 evidenced by Exhibits M-S, not that “the general public knew anything of the purported success of  
5 the DVD.”

6 7. Plaintiff concludes her objections by arguing that Defendants improperly ask the  
7 Court to take judicial notice of the articles and websites attached to the Declaration and the content  
8 within each article. She claims such a request is inappropriate because the content in the articles  
9 do not necessarily support the facts asserted, the articles are subject to varying interpretation, the  
10 articles are hearsay, and the accuracy of the content of the articles can reasonably be questioned.

11 These objections evidence Plaintiff’s misunderstanding of Defendants’ request for judicial  
12 notice. Defendants do not ask the Court to take judicial notice of the *contents* of the articles and  
13 press releases as facts, but rather that “Finding Nemo’s” plot, characters, merchandising, and  
14 success, were publicized, as evidenced by the articles and press releases. Thus, for example,  
15 Defendants do not ask the Court to take judicial notice of the fact that “Finding Nemo” was the  
16 best-selling first-run DVD. Rather, Defendants ask the Court to take judicial notice that it was  
17 *publicized* in November 2003 that “Finding Nemo” was the best-selling first-run DVD. Similarly,  
18 Defendants do not ask the Court to take judicial notice that “Finding Nemo” is the “story of a  
19 widower clown fish who tries to find his only son after the small fry is abducted by an Australian  
20 dentist for his aquarium.” (Roberts Dec., Ex. D.) Rather, Defendants ask the Court to take  
21 judicial notice that “Finding Nemo’s” plot and story line were *publicized* before its general  
22 theatrical release. The articles and press releases therefore are not hearsay because they are not  
23 offered as proof of the matters asserted, but to prove their existence. *In re Avista Corp. Securities*  
24 *Litigation*, 415 F.Supp.2d 1214, 1217-18 (E.D. Wash. 2005), cited by Plaintiff, does not hold  
25 otherwise. *Avista*, 415 F.Supp.2d at 1217-18 (granting request for judicial notice of charts of daily  
26 stock prices). Plaintiff’s objections should accordingly be disregarded.

27 8. Plaintiff does not object to Defendants’ request that the Court take judicial notice of  
28 Plaintiff’s copyright deposit for “Squisher the Fish” (Roberts Dec., Ex. R) and the contents of the

1 motion picture "Finding Nemo" (*id.*, Ex. U), and that deposit should therefore be considered by  
2 the Court on Defendants' motion to dismiss.

3 For the foregoing reasons, this Court should disregard Plaintiff's objections and take  
4 judicial notice of the documents attached as Exhibits A-S of the Roberts Declaration.

5 DATED: January 17, 2007

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7 By /s/ Claude M. Stern

8 Claude M. Stern

9 Attorneys for Defendants The Walt Disney  
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